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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ADOLFO MONTANO, Defendant and Appellant.	F075894 (Super. Ct. No. BF156029A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman, Raymond L. Brosterhous II and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

The appeal in this case follows defendant Adolfo Montano's resentencing in accordance with our prior opinion. (*People v. Montano* (Feb. 22, 2017, F070695) [2017 Cal.App.Unpub. Lexis 1247] [nonpub. opn.] (*Montano I*).) When he was 21 years old, defendant robbed three college students at gunpoint and fired his gun into the air twice.[1] He was convicted by jury of three counts of second degree robbery (Pen. Code, § 212.5, subd. (c))[2] (counts 1 through 3) and one count of being a felon in possession of a firearm (§ 29800, subd. (a)(1)) (count 4). The jury also found true that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and, as to counts 1 through 3, that defendant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)). In a bifurcated proceeding, the trial court found true the two prior prison term enhancement allegations (§ 667.5, subd. (b)) and found true that defendant suffered a prior serious felony conviction (§ 667, subd. (a)(1)).[3] The trial court sentenced defendant to a total aggregate term of 70 years in prison. Defendant appealed the judgment and, in relevant part, a different panel of this court reversed the gang enhancement findings as unsupported by substantial evidence and remanded the matter for resentencing.

On remand, the trial court reimposed the same terms, minus the gang enhancements, resulting in a total determinate prison term of 53 years 4 months, as follows.[4] The court sentenced defendant to the upper term of five years on count 1,

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1 The procedural facts relating to defendant's convictions and the substantive facts underlying the crimes are taken from our opinion in *Montano I*.

2 All further statutory references are to the Penal Code.

3 Defendant was convicted of attempted first degree burglary in 2013. (§§ 664/460, subd. (a).)

4 In *Montano I*, the trial court imposed a 10-year term on count 1 and two terms of three years four months on counts 2 and 3 for the gang enhancements. (§ 186.22, subd. (b)(1)(C).)

doubled to 10 years for the prior strike conviction, plus an additional 20 years for the firearm enhancement, five years for the prior serious felony conviction and one year for the prior prison term enhancement, for a total determinate term of 36 years. On counts 2 and 3, the trial court sentenced defendant on each of the counts to a one-year term (one-third of the middle term), doubled to two years for the prior strike conviction, plus an additional six years eight months for the firearm enhancement, for a total determinate term of eight years eight months.

In this appeal, defendant claims his sentence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution, and trial counsel's failure to request that his prior serious felony conviction be stricken pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) constituted ineffective assistance of counsel, in violation of his rights under the federal and state Constitutions. In supplemental briefing, defendant requests this matter be remanded to allow the trial court to exercise its discretion to strike one or more of the firearm enhancements in light of the amendment to section 12022.53, subdivision (h), effective January 1, 2018, permitting a trial court, in the interest of justice, to strike or dismiss an enhancement under the statute. (Sen. Bill No. 620, approved by Governor, Oct. 11, 2017 (2017-2018 Reg. Sess.) ch. 682, § 2 (Senate Bill No. 620 or Sen. Bill No. 620).) Finally, in further supplemental briefing, defendant requests this matter also be remanded to allow the trial court to exercise its discretion to strike his prior serious felony conviction enhancement given the recent amendments to sections 667, subdivision (a)(1), and 1385 effective January 1, 2019. (Sen. Bill No. 1393, approved by Governor, Sept. 30, 2018 (2017-2018 Reg. Sess.) ch. 1013, § 1–2 (Senate Bill No. 1393 or Sen. Bill No. 1393).)

The People dispute defendant's entitlement to any relief on his cruel and unusual punishment and ineffective assistance of counsel claims. They do not dispute that the

amendment to section 12022.53, subdivision (h), applies retroactively to judgments not final on appeal, but they argue this matter need not be remanded because it is clear from the record that the trial court would not have exercised its discretion to strike the enhancement. They did not file a response to defendant's supplemental brief requesting remand as to the amendment to section 667, subdivision (a)(1)).

We reject defendant's claims that his sentence constitutes cruel and unusual punishment and that, even assuming error, trial counsel's failure to bring a *Romero* motion was prejudicial. However, we agree with defendant that this matter should be remanded so that the trial court may exercise its discretion in the first instance with respect to whether to strike one or more of the firearm enhancements and the prior serious felony conviction enhancement. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*); *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428.)

FACTUAL SUMMARY

At around 11:00 p.m. on July 11, 2014, college students Luis E., Michael D. and Jose B. went to a house party in Bakersfield that Jose had learned of via social media. They were unfamiliar with the area, did not know whose house it was and did not know any of the other guests, but they had gone hoping to meet some young women. There was drinking and drug use occurring at the party, but they did not participate. They left around 1:00 or 1:15 a.m.

As the three walked toward Jose's car, defendant, who was across the street from them, asked where they were going. Luis, Michael and Jose had seen defendant at the house party but they did not interact with him there and did not know him. As they answered, defendant, along with two other Hispanic men, began crossing the street toward them. Mid-street, defendant pulled out a revolver, said, "give me all your sh_t," and demanded their wallets and phones. Defendant jabbed the barrel of the gun into Jose's chest or stomach, and one or both men with defendant assisted with the theft of Jose's watch, wallet and phone. Michael also handed over his wallet and phone to

defendant. Luis was robbed last. He was in shock and took his time getting his wallet and phone out. Defendant jabbed Luis's throat with the gun barrel, told him to hurry up and warned him that if he tried anything, defendant would pistol-whip him.

After they handed over their belongings, defendant backed away, laughing, and said "pray to God that [he] let [them] live" or "pray to God you live another day." Defendant shot the gun twice at an angle over their heads as they ducked behind a car for protection. After defendant turned the street corner, they waited a bit before running to their car and driving home.

DISCUSSION

I. Cruel and Unusual Punishment Claim

A. Legal Standard

Defendant claims his sentence constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution.[5] As the United States Supreme Court explained in *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), "The Eighth Amendment states: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to '"the evolving standards of decency that mark the progress of a maturing society." [Citations.] 'This is because "[t]he standard of extreme cruelty is not merely descriptive, but

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5 Separately, "'Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel *or* unusual" punishment.'" (*People v. Baker* (2018) 20 Cal.App.5th 711, 723; accord, *People v. Palafox* (2014) 231 Cal.App.4th 68, 82.) "A punishment is cruel or unusual in violation of the California Constitution 'if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Baker*, *supra*, at p. 723, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424; accord, *People v. Perez* (2016) 3 Cal.App.5th 612, 616.) Defendant does not advance a claim of disproportionality under the California Constitution, but our conclusion that his sentence is not grossly disproportionate under the federal constitution, discussed *post*, would apply as well to any claim brought under the state constitution. (*People v. Palafox*, *supra*, at p. 82 ["The touchstone in each is gross disproportionality."].)

necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." [Citations.]

"The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. [Citation.] '[P]unishments of torture,' for example, 'are forbidden.' [Citation.] These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes. [¶] For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' [Citation.] [¶] The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." (*Graham*, *supra*, 560 U.S. at pp. 58–59; accord, *In re Kirchner* (2017) 2 Cal.5th 1040, 1046; *Gutierrez*, *supra*, 58 Cal.4th at p. 1374.)

"Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Palafox*, *supra*, 231 Cal.App.4th at p. 82; see *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1217.) "The touchstone … is gross disproportionality." (*People v. Palafox*, *supra*, at p. 82; accord, *People v. Baker*, *supra*, 20 Cal.App.5th at p. 733.)

B. Analysis

1. Young Adult Offenders

As defendant recognizes, over approximately the past decade, the United States Supreme Court and the California Supreme Court have recognized a distinction between juvenile offenders and adult offenders. (*Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*); *Graham*, *supra*, 560 U.S. 48; *Roper v. Simmons* (2005) 543 U.S. 551; *People v. Contreras* (2018) 4 Cal.5th 349; *People v. Franklin* (2016) 63 Cal.4th 261; *People v. Caballero* (2012) 55 Cal.4th 262.) The decisions reflect the understanding that "because juveniles have lessened culpability they are less deserving of the most severe punishments." (*Graham*, *supra*, at p. 68.) While "[a] juvenile is not absolved of responsibility for his actions, … his transgression 'is not as morally reprehensible as that of an adult.'" (*Ibid.*) Thus, the Eighth and Fourteenth Amendments of the United States Constitution prohibit juvenile offenders from being sentenced to death for their crimes (*Roper v. Simmons*, *supra*, at p. 578) and, in homicide cases, mandatory sentences of life without the possibility of parole (LWOP) (*Miller*, *supra*, at p. 465), or the functional equivalent (*People v. Franklin*, *supra*, at p. 276), are prohibited for juveniles. In nonhomicide cases, juveniles may not receive an LWOP sentence or a "[s]entence that amounts to the functional equivalent of a[n] LWOP] sentence" (*People v. Caballero*, *supra*, at p. 268), and they must be afforded "a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" (*People v. Contreras*, *supra*, at p. 379, quoting *Graham*, *supra*, at p. 75).

Defendant was 21 years old when he committed the offenses at issue in this appeal. He claims his sentence of 53 years 4 months constitutes cruel and unusual punishment under the federal Constitution because it is the functional equivalent of an LWOP sentence. Defendant acknowledges he was not a juvenile at the time of the offenses, but he contends the constitutional prohibition against the functional equivalent of an LWOP sentence for juvenile offenders should also apply to persons his age,

especially given the 2015 amendment to section 3051, which, in relevant part, provided for a youthful offender parole hearing for those who were 23 years old or younger when they committed their controlling offense. (§ 3051, former subd. (a)(1).)

Defendant cites no authority for the proposition he advances, however, and this argument has repeatedly been rejected, even in the context of 18-year-old offenders. (*People v. Windfield* (2016) 3 Cal.App.5th 739, 766–767, review granted Jan. 11, 2017, S238073 [18 years old]; *People v. Perez*, *supra*, 3 Cal.App.5th at p. 618 [20 years old]; *People v. Abundio*, *supra*, 221 Cal.App.4th at pp. 1220–1221 [18 years old]; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 [18 years old].) As the Court of Appeal explained in *People v. Argeta*, "while '[d]rawing the line at 18 years of age is subject … to the objections always raised against categorical rules … [, it] is the point where society draws the line for many purposes between childhood and adulthood.' [Citations.] Making an exception for a defendant who committed a crime just five months past his 18th birthday opens the door for the next defendant who is only six months into adulthood. Such arguments would have no logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes …." (*People v. Argeta*, *supra*, at p. 1482, quoting *Roper v. Simmons*, *supra*, 543 U.S. at p. 574 & citing *Graham*, *supra*, 560 U.S. at p. 50; accord, *People v. Windfield*, *supra*, at pp. 766–767, review granted; *People v. Perez*, *supra*, at p. 617; *People v. Abundio*, *supra*, at pp. 1220–1221; see *Gutierrez*, *supra*, 58 Cal.4th at p. 1380 [discussing, in a special circumstance murder case involving two 17-year-old offenders and in context of interpreting trial courts' sentencing discretion under section 190.5, the bright line rule between offenders under age 18 and those age 18 and older].) As the Court of Appeal more recently stated in *People v. Perez*, "Our nation's, and our state's, highest court[s] have concluded 18 years old is the bright line rule and we are bound by their holdings." (*People v. Perez*, *supra*, at

p. 617.) We concur and decline defendant's invitation to extend the sea change in the law pertaining to juvenile offenders to adult offenders between the ages of 18 and 21.

Nor does defendant's reference to the recent amendment to section 3051 persuade us otherwise. Defendant was convicted and sentenced in 2014, and he was resentenced in 2017. Effective January 1, 2016, section 3051, subdivision (a)(1), was amended as follows: "A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was under 23 years of age at the time of his or her controlling offense." (Sen. Bill No. 261, approved by Governor, Oct. 3, 2015 (2014-2015 Reg. Sess.) ch. 471, § 1.) Effective January 1, 2018, the statute was amended, in relevant part, to extend its application to those 25 years of age or younger at the time of the controlling offense. (Sen. Bill No. 394, approved by Governor, Oct. 11, 2017 (2017-2018 Reg. Sess.) ch. 684, § 1.5.)

As set forth in the legislative history for the initial 2016 amendment, the amendment to section 3051 held youthful offenders accountable by requiring they serve 15 to 25 years in prison before becoming eligible for parole, but reflects the Legislature's recognition that, because critical brain development continues past the age of 18 and into the early 20's, youthful offenders are capable of change. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 261 (2015-2016 Reg. Sess.) June 1, 2015, pp. 1–3.) However, this legislative recognition and attempt to balance potential for change with accountability for youthful offenders does not support the expansion of the law urged by defendant. As we have explained, the law, to which we are bound, recognizes a bright-line distinction between those who were under the age of 18 years when they committed their offenses and those who were 18 years or older. While special considerations apply to juvenile offenders, defendant was not a juvenile offender.

We note that if section 3051 applied to defendant, it might be appropriate to remand the matter to allow him to make a record of those factors relevant to youthful

offender parole hearings. (*People v. Perez*, *supra*, 3 Cal.App.5th at p. 619; accord, *People v. Windfield*, *supra*, 3 Cal.App.5th at p. 769, review granted; cf. *People v. Woods* (2018) 19 Cal.App.5th 1080, 1088–1089.) However, section 3051 contains exclusions and, as defendant concedes, he is not entitled to a youthful offender parole hearing because he was sentenced pursuant to the Three Strikes law. (§ 3051, subd. (h).) Nevertheless, as we discuss in part III., defendant's age is a relevant factor the trial count may consider when it determines whether to exercise its discretion to strike one or more of the firearm enhancements or the serious felony enhancement.

2. Disproportionality

Defendant also argues that his lengthy sentence, which resulted from his status as a three strikes offender, the commission of crimes against three victims and his use of a firearm, was grossly disproportionate to the crimes. He cites to no supporting authority, however, and as the Court of Appeal explained in *People v. Reyes*, "[o]utside the death penalty context, '"successful challenges to the proportionality of particular sentences have been exceedingly rare."' [Citations.] There is no question that 'the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts."' [Citation.] It is for this reason that when faced with an allegation that a particular sentence amounts to cruel and unusual punishment, '[r]eviewing courts … should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes ….'" (*People v. Reyes* (2016) 246 Cal.App.4th 62, 83.) Thus, "'[o]nly in the "exceedingly rare" and "extreme" case' will a sentence be grossly disproportionate to the crime." (*People v. Baker*, *supra*, 20 Cal.App.5th at p. 732; accord, *People v. Abundio*, *supra*, 221 Cal.App.4th at p. 1221.) This is not such a case. Defendant had a prior criminal record and although it was not lengthy, as discussed in part III., it nevertheless included a serious felony within the meaning of the Three Strikes law and evidenced a pattern of escalating criminal behavior. In addition, the crimes were

unprovoked; defendant jabbed or poked two of the victims with his gun; he fired the gun in the air, terrifying the victims; and he threatened their lives. Defendant acknowledges the crimes were serious, but under the Three Strikes law, which applies to serious and/or violent felonies, robbery is categorized as a *violent* crime, notwithstanding that no one was shot or otherwise physically injured. (§§ 667, subd. (d)(1), 667.5, subd. (c).) Under these circumstances, we cannot find that defendant's sentence, while lengthy, was grossly disproportionate to the crimes committed.[6]

II. Ineffective Assistance of Counsel

A. Standard of Review

Next, defendant claims trial counsel's failure to bring a *Romero* motion on his behalf constituted ineffective assistance of counsel. "In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–692.) To demonstrate deficient performance, [the] defendant bears the burden of showing that counsel's performance '"'"'fell below an objective standard of reasonableness … under prevailing professional norms.'"'"' (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) To demonstrate prejudice, [the] defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Ibid.*; *In re Harris* (1993) 5 Cal.4th 813, 833.)" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

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6 Defendant does not parse out the firearm enhancement, but we note that the imposition of lengthy terms under section 12022.53 has been upheld in the face of challenges on grounds of cruel and/or unusual punishment. (*People v. Em* (2009) 171 Cal.App.4th 964, 972–973 [rejecting challenge to 25-year-to-life sentence under section 12022.53 as cruel and/or unusual punishment]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16–19 [same], overruled on another ground recognized by *In re Johnson* (2016) 246 Cal.App.4th 1396, 1406–1407; *People v. Martinez* (1999) 76 Cal.App.4th 489, 497–498 [same].)

"On appeal, we do not second-guess trial counsel's reasonable tactical decisions." (*People v. Lucas* (2014) 60 Cal.4th 153, 278, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) "[A] defendant's burden [is] 'difficult to carry on direct appeal,' as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had '"'no rational tactical purpose"'" for an action or omission." (*People v. Mickel, supra,* 2 Cal.5th at p. 198, quoting *People v. Lucas* (1995) 12 Cal.4th 415, 437.)

B. Analysis

1. Background: *Romero* Motions

Pursuant to section 1385, trial courts have the discretion to strike prior felony convictions, either on their own motion or on request by the prosecution, "in furtherance of justice."[7] (*Romero, supra,* 13 Cal.4th at p. 530; accord, *People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*).) A defendant is not entitled to make a motion to strike a conviction, but may invite the court to do so.[8] (*Carmony, supra,* at p. 375.)

"'[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders.'" (*Carmony, supra*, 33 Cal.4th at p. 377.) "To achieve this end, 'the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this

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7 Effective January 1, 2019, section 1385 was amended to eliminate former subdivision (b), which provided, "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Sen. Bill No. 1393, ch. 1013, § 2.)

8 Despite the lack of entitlement to bring a motion, such requests are commonly known as *Romero* motions. (E.g., *People v. Vargas* (2014) 59 Cal.4th 635, 646.)

defendant should be treated as though he actually fell outside the Three Strikes scheme.'"" (*Ibid.*)

The Supreme Court has established "stringent standards that sentencing courts must follow" in order to find an exception to the Three Strikes scheme. (*Carmony, supra*, 33 Cal.4th at p. 377.) "'[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to … section 1385[, subdivision](a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.'" (*Ibid.*)

Thus, "the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony*, *supra*, 33 Cal.4th at p. 378; accord, *Gutierrez*, *supra*, 58 Cal.4th at p. 1382.)

2. Any Error Harmless

a. Error

The record is silent regarding why trial counsel elected not to bring a *Romero* motion. Defendant argues that because there was no detriment to bringing the motion, no reasonable tactical reason excuses the failure to do so. The People point out that in seeking leniency, trial counsel "wisely focused" on arguing the lengthy sentence constituted cruel and unusual punishment, and, in the alternative, requesting the court

strike or stay the firearm enhancement or the prior serious felony enhancement.[9] The People state, "No doubt counsel's efforts here were limited in part by [her] desire to preserve [her] credibility with the trial judge."

Defendant stresses his youth, his ingestion of alcohol and marijuana prior to the crimes, and the fact that, prior to committing the crimes in this case, he had only three felony convictions and served only one prison sentence. He also points out that at the time of these crimes, he was working and "had good prospect[s] outside of prison." However, a trial court's decision "to strike a prior conviction should be '"extraordinary"'" (*Gutierrez*, *supra*, 58 Cal.4th at p. 1382), and these factors did not necessarily weigh in defendant's favor, as despite having a high school diploma and a job, he chose to rob three people at gunpoint. Moreover, the court's comments indicate it was focused on the fact that defendant had a juvenile record and as a young adult, he continued to violate the law, resulting first in a jail sentence after violating probation and then in a prison sentence after again violating probation following release from jail. The court specifically noted that defendant committed the robberies in this case only two months after he was released from prison for attempted first degree burglary. Notably, the court found multiple aggravating factors and no mitigating factors.

"Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile" (*People v. Price* (1991) 1 Cal.4th 324, 387; accord, *People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24; *People v. Thompson* (2010) 49 Cal.4th 79, 122), and given the legal preference *against* striking prior convictions (*Gutierrez, supra,* 58 Cal.4th at p. 1382), counsel may well have decided that any argument for leniency was best directed at the length of defendant's overall sentence and the enhancements rather than arguing that defendant, with his steady

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9 As discussed in part III., although the trial court lacked the discretion to strike the firearm enhancement or the prior serious felony conviction, the record is silent regarding its awareness of the scope of its discretion.

accrual of criminal convictions, fell outside the spirit of the Three Strikes law. The California Supreme Court has "repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] … unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267, quoting *People v. Wilson* (1992) 3 Cal.4th 926, 936; accord, *People v. Johnson* (2016) 62 Cal.4th 600, 653.) Regardless, even if we assume counsel erred in failing to bring a *Romero* motion, defendant cannot demonstrate prejudice.

b. Prejudice

Defendant argues counsel's failure to bring the motion resulted in prejudice to him because had the court granted the motion, he would no longer be subject to the Three Strikes law, which would affect the length of his sentence and render him eligible for a youthful offender parole hearing under section 3051. We do not minimize the benefits of avoiding sentencing as a three strikes offender, but defendant's focus is misplaced. The relevant inquiry is whether there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. First, as we have stated, the Three Strikes law "creates a strong presumption that any sentence that conforms to these sentencing norms[, such as here,] is both rational and proper" (*Carmony*, *supra*, 33 Cal.4th at p. 378), and the decision to strike a prior conviction should be """extraordinary""" (*Guiterrez*, *supra*, 58 Cal.4th at p. 1382).

Second, we agree with the People that the sentencing record undermines any claim that there was a reasonable probability the trial court would have taken the extraordinary step of deeming defendant outside the spirit of the law. Trial counsel argued for leniency, although in the form of striking the enhancements, but the court's colloquy was straightforwardly unsympathetic. The court addressed the facts of the case, which

included jabbing and pointing a gun at the victims, threatening them, laughing after threatening them and firing two shots. The court discussed defendant's record, which included multiple felonies despite his relatively young age; the fact that defendant did not perform satisfactorily on probation, which led to jail time and then prison time; and the fact that he committed the robberies while out on parole. The court found multiple factors in aggravation—numerous juvenile and adult offenses, commission of the crimes while on parole, and unsatisfactory performance on probation and parole—and no factors in mitigation; and it imposed the upper term for each offense. Under these circumstances, defendant fails to meet his burden of demonstrating that, had counsel also made a *Romero* motion, it is reasonably probable that the court would have granted it and stricken defendant's prior serious felony conviction, particularly where the prior felony was a serious felony under the law and defendant escalated his conduct by committing a violent felony soon after release on parole. (§§ 667, subd. (d)(1), 667.5, subd. (c)(9), 1192.7, subd. (c)(18).) Accordingly, any arguable error by counsel was harmless.

III. Recent Amendments to Sections 12022.53 and 667, Subdivision (a)(1)

A. Background

Finally, defendant was resentenced on June 16, 2017, at which time the trial court was required to impose the 20-year enhancement under section 12022.53, former subdivision (h), for personal use of a firearm and the five-year enhancement under section 667, former subdivision (a)(1), for his prior serious felony conviction for attempted burglary. However, effective January 1, 2018, section 12022.53, was amended to permit a trial court, in furtherance of justice, to strike or dismiss an enhancement otherwise required to be imposed under the statute.[10] (Sen. Bill No. 620, ch. 682, § 2.) As well, effective January 1, 2019, section 667, subdivision (a)(1), and section 1385 were

[10] Section 12022.53, subdivision (a) was amended effective January 1, 2019, but those amendments are not relevant in this case. (Sen. Bill No. 1494, ch. 423, § 114.)

amended to permit a trial court, in the furtherance of justice, to strike or dismiss a five-year enhancement under section 667, subdivision (a)(1). (Sen. Bill No. 1393, ch. 1013, §§ 1–2.)

As previously stated, the People did not respond to defendant's request for remand following the amendments to sections 667, subdivision (a)(1). and 1385 pursuant to Senate Bill No. 1393, but they agree with defendant that the amendment to section 12022.53, subdivision (h), pursuant to Senate Bill No. 620 applies retroactively in this case. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973; *People v. McDaniels*, *supra*, 22 Cal.App.5th at pp. 424–425.) They do not agree, however, that remand for resentencing is required. Defendant argues that his sentence for discharging a firearm over the heads of the victims was significant, making it likely the trial court would have stricken or dismissed one or more of the firearm enhancements, and his adult record was comprised of only three prior felony convictions. Defendant contends that because the court did not discuss whether it would strike the enhancements if it had the discretion to do so, the record is *not* clear that it would not have done so and he is entitled to remand. The People assert that remand is not appropriate because it *is* clear from the sentencing record that the trial court would not have exercised its discretion to strike the firearm enhancement.

In this case, defendant's trial counsel requested the court strike or stay the enhancements under sections 12022.53 and 667, subdivision (a)(1). At that time, the court lacked the discretion to strike or stay the enhancements, but the record is silent regarding its awareness of the scope of its discretion. However, "'[i]n the absence of evidence to the contrary, we presume [on review] that the court "knows and applies the correct statutory and case law."'" (*People v. Jones* (2017) 3 Cal.5th 583, 616, quoting *People v. Thomas* (2011) 52 Cal.4th 336, 361; accord, *Gutierrez*, *supra*, 58 Cal.4th at p. 1390.)

B. Analysis

The People rely on *People v. McVey* (2018) 24 Cal.App.5th 405, 419 (*McVey*) and *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 in support of their argument that remand is not necessary. In *People v. Gutierrez*, the Court of Appeal was tasked with determining whether reconsideration of sentencing was required after the California Supreme Court held in *Romero* that trial courts have the discretion to strike prior convictions. (*People v. Gutierrez*, *supra*, at p. 1896, citing *Romero*, *supra*, 13 Cal.4th 497.) The defendant in *People v. Gutierrez* was 34 years old, and he attacked two men who were at least 30 older than he was, resulting in convictions for robbery and attempted robbery. (*People v. Gutierrez*, *supra*, at p. 1896.) The trial court imposed a total aggregate sentence of 18 years 4 months and, during sentencing, the court stated the defendant "was 'clearly engaged in a pattern of violent conduct, which indicates he is a serious danger to society.'" (*Ibid.*) Further, in the context of deciding whether to impose two one-year enhancements under section 667.5, former subdivision (b), the trial court stated, "'[T]here really isn't any good cause to strike it. There are a lot of reasons not to, and this is the kind of individual the law was intended to keep off the street as long as possible.'" (*People v. Gutierrez*, *supra*, at p. 1896.)

More recently, however, the California Supreme Court reiterated, "'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*Gutierrez*, *supra*, 58 Cal.4th at p. 1391.)

Post-*Guiterrez*, most of the published cases considering whether remand is appropriate to allow the trial court to exercise its discretion in the first instance have concluded that remand is appropriate. (*People v. Garcia*, *supra*, 28 Cal.App.5th at p. 973 [Sen. Bill No. 1393]; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109–1111 [Sen. Bill No. 620]; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081–1082 [Sen. Bill No. 620]; *People v. McDaniels*, *supra*, 22 Cal.App.5th at pp. 427–428 [Sen. Bill No. 620].) In the minority is *McVey*, cited by the People. In that case, the Court of Appeal found that remand "would serve no purpose but to squander scarce judicial resources." (*McVey*, *supra*, 24 Cal.App.5th at p. 419, citing *People v. Fuhrman* (1997) 16 Cal.4th 930, 946 & *People v. Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) The defendant in *McVey* shot a homeless man multiple times, killing the victim, and he received an aggregate sentence of 16 years 8 months. (*McVey*, *supra*, at pp. 409–410.) The Court of Appeal noted that in imposing a 10-year term for the firearm enhancement, the trial court "described [the defendant's] attitude as 'pretty haunting'" and stated, "'[T]his is as aggravated as personal use of a firearm gets,' and 'the high term of 10 years on the enhancement is the only appropriate sentence on the enhancement.'"[11] (*McVey*, *supra*, at p. 419.)

In this case, based on the imposition of four enhancements, defendant's sentence was enhanced by a cumulative total of 38 years 4 months for firing two shots above the heads of the victims. We do not minimize defendant's crimes, which as we have stated constitute violent felonies under the Three Strikes law, but the disposition in *McVey* should not be divorced from its context: the victim was shot to death, the single enhancement imposed comprised the majority of the defendant's 16 year 8 month prison

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11 The firearm enhancement at issue in *McVey* was section 12022.5, subdivision (a), which provides: "Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

sentence and, unlike in this case, the trial court expressly commented on its imposition of the aggravated firearm enhancement term. (*McVey*, *supra*, 24 Cal.App.5th at p. 419.)

In *People v. Almanza*, the Court of Appeal initially affirmed judgment and declined to remand the matter to the trial court in light of Senate Bill No. 620. It then granted rehearing, concluding, "We are persuaded … by [*People v.*] *McDaniels* and defense counsel that speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence. This is the case when there is a retroactive change in the law subsequent to the date of the original sentence that allows the trial court to exercise discretion it did not have at the time of sentence." *(People v. Almanza*, *supra*, 24 Cal.App.5th at pp. 1110–1111.) We agree.

Although the record indicates the trial court was not sympathetic, and not without good reason, it remains that at the time defendant was sentenced, the court lacked the discretion to strike or stay either the firearm enhancements or the prior serious felony enhancement. Defendant was 21 years old when he committed the robberies and his criminal record, which spanned four years, was not lengthy. Again, we do not minimize the seriousness of defendant's crimes or his pattern of criminal behavior, which indicated an inability or unwillingness to conform to societal laws, nor have we overlooked the fact that defendant's age and time in custody necessarily have some bearing on the length of his criminal record. Nevertheless, defendant is entitled to be sentenced in the exercise of informed discretion and given his youth, the absence of a lengthy criminal record, and the imposition of an extremely lengthy sentence, the majority of which is attributable to the three firearm enhancements and one serious felony conviction enhancement, remand is appropriate so that the trial court may exercise its discretion in the first instance in light of the amendments to sections 12022.53, subdivision (h), and 667, subdivision (a)(1), notwithstanding the trial court's determination that the aggravated terms were appropriate. We express no opinion on how the trial court should exercise its discretion on remand, but for the reasons we have discussed, we do not agree with the People that

remand under these circumstances would be an idle act. (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425.)

DISPOSITION

The matter is remanded to the trial court to exercise its discretion under Penal Code section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018), and Penal Code sections 667, subdivision (a)(1), and 1385 as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2, eff. Jan. 1, 2019) and, if appropriate following exercise of that discretion, to resentence defendant accordingly and provide a corrected abstract of judgment to the appropriate agencies. The judgment is otherwise affirmed.

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MEEHAN, J.

WE CONCUR:

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LEVY, Acting P.J.

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FRANSON, J.